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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

10 RICHARD LEE JOHNSEN,

11 Plaintiff,

12 v.

13 DEPUTY LELAND HARLAN, et al.,

14 Defendants.

CASE NO. C19-58 MJP

ORDER ON REPORT AND  
RECOMMENDATION

15  
16 The above-entitled Court, having received and reviewed:

- 17 1. Report and Recommendation (Dkt. No. 41),  
18 2. Defendant Harlan's Objections to Magistrate Judge's Report and Recommendation  
19 (Dkt. No. 44),

20 all attached declarations and exhibits, and relevant portions of the record, rules as follows:

21 IT IS ORDERED THAT the Report and Recommendation is PARTIALLY ADOPTED  
22 and PARTIALLY REJECTED; Defendants' motion for summary judgment (Dkt. No. 29) will be  
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1 GRANTED as to Plaintiff's request for compensatory damages and DENIED as to Plaintiff's  
2 Fourteenth Amendment claims against both Officer Harlan and Officer Gomez.

### 3 **Discussion**

#### 4 Factual background

5 The Court adopts and incorporates by reference the "Facts" section of the Report and  
6 Recommendation ("R&R"). Dkt. No. 41 at 2-3.

#### 7 Procedural background

8 Plaintiff filed this suit in January 2019 (Dkt. No. 1), then filed a second amended  
9 complaint in April 2019. (Dkt. No. 21.) He alleges violations of his constitutional rights as a  
10 result of Defendants' actions (id. at 6), and requests declaratory and injunctive relief as well as  
11 compensatory and punitive damages. (Id. at 7-8.)

12 Defendants have filed a summary judgment motion seeking dismissal of all claims  
13 against them. The motion is fully briefed. The Honorable Mary A. Theiler issued a Report and  
14 Recommendation (Dkt. No. 41) endorsing the following actions:

- 15 1. GRANTING Defendants' motion for dismissal of Plaintiff's claim for compensatory  
16 damages,
- 17 2. DENYING Defendant Harlan's motion for dismissal of Plaintiff's constitutional claims  
18 against him, and
- 19 3. GRANTING Defendant Gomez's motion for dismissal of Plaintiff's constitutional claims  
20 against him.

21 Defendant Harlan timely filed his objections to the recommendation. (Dkt. No. 44.)  
22 Plaintiff filed no objections.

1 Analysis

2 Plaintiff alleges no physical injury as a result of Defendants' action, only that "the  
3 defendants did intentionally cause, the plaintiff, [*sic*] emotional distress for the plaintiff's life."  
4 (Dkt. No. 21 at ¶27.) The Prison Litigation Reform Act clearly states:

5 No Federal civil action may be brought by a prisoner confined in a jail,  
6 prison, or other correctional facility, for mental or emotional injury  
suffered while in custody without a prior showing of physical injury.

7 42 U.S.C. § 1997e(e). Thus, while Plaintiff may be entitled to punitive or nominal damages  
8 should a jury find in his favor on his constitutional claims, his claim for compensatory damages  
9 must be dismissed.

10 Turning to Defendant Harlan's objections, there appears to be no dispute that the  
11 allegations of Plaintiff's complaint satisfy the requirements for a civil rights claim under § 1983:  
12 Plaintiff alleges (1) a violation of rights protected by the U.S. Constitution (2) proximately  
13 caused by a person or persons acting under color of state law. West v. Atkins, 487 U.S. 42, 48  
14 (1988); Crumpton v. Gates, 947 F.2d 1418, 1420 (9th Cir. 1991).

15 Defendant Harlan does not dispute that "pretrial detainees have a clearly established  
16 Fourteenth Amendment due process right to be free from violence from other inmates." Castro  
17 v. County of Los Angeles, 833 F.3d 1060, 1066 (9th Cir. 2016). Defendant Harlan's objections  
18 to the Magistrate Judge's findings are confined to whether the Report and Recommendation  
19 properly applied the elements of a pretrial detainee's Fourteenth Amendment failure-to-protect  
20 claim to his situation. Those elements are:

- 21 (1) The defendant made an intentional decision with respect to the conditions under which  
22 the plaintiff was confined;  
23 (2) Those conditions put the plaintiff at substantial risk of suffering serious harm;  
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1 (3) The defendant did not take reasonable available measures to abate that risk, even though  
2 a reasonable officer in the circumstances would have appreciated the high degree of risk  
3 involved – making the consequences of the defendant’s conduct obvious; and

4 (4) By not taking such measures, the defendant caused the plaintiff’s injuries.

5 Id. at 1071.

6 Defendant Harlan’s defense to this claim may be summarized as “I didn’t have enough  
7 time to make an ‘intentional’ decision regarding the conditions of confinement.” Harlan cites a  
8 number of cases involving high speed chases and life or death situations where courts have  
9 immunized officers who had to make snap judgments. *See County of Sacramento v. Lewis*, 523  
10 U.S. 833, 853-54 (1998); *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010) (Dkt. No. 44,  
11 Objections at 5-6). The Court finds these cases distinguishable, both in the severity of the  
12 situation and the time in which the officers had to make their decision.

13 Additionally (as even Harlan points out), Plaintiff’s testimony is that Harlan had enough  
14 time from the point at which the hostile inmate began advancing on Harlan to simply exit the  
15 day-room, thereby defusing the entire situation. Thus, in addition to evidence indicating a non-  
16 life threatening situation which did not require a “split-second” snap judgment, this is also a  
17 situation where disputed issues of material fact preclude the granting of summary judgment and  
18 render the case amenable to resolution only by trial.

19 Further, Harlan argues that Plaintiff was never at serious risk of physical harm, pointing  
20 out that Beazizo (the hostile inmate) was angry at him (Harlan), not the Plaintiff. The Court  
21 finds no merit in this position – it would be entirely reasonable for a jury to conclude that, in a  
22 volatile and violent circumstance such as has been depicted by the evidence here, Plaintiff could  
23 well have been the victim of violence from the aggressor either directly (i.e., Beazizo clearly  
24

1 wanted to strike *someone* and Harlan made Plaintiff the most easily available target) or indirectly  
2 (i.e., Beazizo could have injured Plaintiff simply trying to get to Harlan).

3 Harlan also points out that it appeared that Plaintiff's presence was actually calming  
4 Beazizo down, but the Court does not find that a meritorious defense. Defendant does not testify  
5 that he knew that Plaintiff would help defuse the situation *before* he decided to use Plaintiff as a  
6 human shield, and cites no case law holding it a defense (1) to put an inmate in harm's way  
7 because the inmate appears to be attempting to defuse the situation or (2) that it turned out *after*  
8 the decision had been made that Plaintiff had a calming effect on the aggressor.

9 Neither does the fact that Harlan summoned other deputies to assist him constitute  
10 "reasonable available measures to abate [the] risk." In the first place, there is ample evidence  
11 that Defendant Gomez, the second deputy to arrive on the scene, *also* used Plaintiff as a human  
12 shield (*see infra*). Secondly, viewing the facts in the light most favorable to the non-moving  
13 party, a reasonable jury could find that there was sufficient time for Beazizo to have injured  
14 Plaintiff before the remainder of the deputies arrived and brought the situation under control.

15 Defendant Harlan is not entitled to summary judgment on the failure-to-protect claim. In  
16 reaching this decision, the Court has made a *de novo* review of those portions of the R&R to  
17 which Harlan objected. ("When a *specific* objection is made to a portion of a magistrate judge's  
18 report-recommendation, the Court subjects that portion of the report-recommendation to a *de*  
19 *novo* review. Fed. R. Civ. P. 72(b)(2); 28 U.S.C. § 636(b)(1)(C);" Bushey v. Comm'r of Soc.  
20 Sec., No. 8:16-CV-0774 (GTS/WBC), 2017 U.S. Dist. LEXIS 159137, at \*10-11 (N.D.N.Y. Sep.  
21 27, 2017)(emphasis in original).)

22 No objection, however, was filed regarding the R&R's recommendation that the  
23 constitutional claims against Defendant Gomez be dismissed.

1 [W]hen *no* objection is made to a portion of a report-recommendation, the  
2 Court subjects that portion of the report-recommendation to only a *clear*  
3 *error* review. Fed. R. Civ. P. 72(b), Advisory Committee Notes: 1983  
4 Addition. When performing such a "clear error" review, "the court need  
only satisfy itself that there is no clear error on the face of the record in  
order to accept the recommendation." Id.

5 Bushey, *supra* (emphasis in original). In reviewing the recommendation that summary judgment  
6 be granted as regards Defendant. Gomez, the Court finds clear error and declines to adopt the  
7 recommendation.

8 Even recognizing that the period of time between Officer Gomez entering the day room  
9 and the defusing of the potentially hostile situation (i.e., the point at which a larger group of  
10 officers responded and subdued the hostile inmate) is shorter than the interval during which  
11 Officer Harlan was present and interposing Plaintiff between himself and the aggressor, the  
12 Court sees little difference between the circumstances of the two defendants vis-à-vis the  
13 elements of the constitutional claim.

14 There is abundant evidence that Officer Gomez did exactly what Officer Harlan did:  
15 entered the day room, observed the situation and proceeded to situate himself behind Plaintiff.  
16 As the R&R put it, "[a]ccording to plaintiff and several inmate witnesses, Officer Gomez ran  
17 behind plaintiff and used him as a shield until more officers arrived in the day room." R&R at 3  
18 (*citing* Dkt. No. 38, Decl. of Johnsen at 3; Dkt. No. 15, Decl. of Dutcher at 2; Dkt. No. 16, Decl.  
19 of Griffin at 2; Dkt. No. 17, Decl. of Keith at 2).

20 The R&R finds it significant that "only eight seconds elapsed between the time Officer  
21 Gomez entered the day room and the arrival of the other deputies," reasoning that "[n]o  
22 reasonable jury could conclude that Officer Gomez failed to take reasonable measures to abate  
23 the risk within eight seconds of him entering an unknown situation." R&R at 9. The Court does  
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1 not agree. In that eight-second interval (which likely seemed like quite a long time to Plaintiff),  
2 Officer Gomez had enough time to decide whether to confront the hostile inmate himself or take  
3 shelter behind Plaintiff.

4 Not to put too fine a point to it, but it is part of the job of jail security officers to confront  
5 and subdue hostile inmates; doing so in this situation would have been a “reasonable measure to  
6 abate the risk” to Plaintiff and a reasonable jury could find that eight seconds was plenty of time  
7 to decide whether to do his job or leave Plaintiff in harm’s way. It is, at the very least, clear error  
8 to decide that as a matter of law Plaintiff cannot be said to have stated an arguable claim to a  
9 violation of his constitutional rights.

### 10 **Conclusion**

11 Plaintiff does not challenge the R&R’s conclusion that, having alleged no physical  
12 injuries, he is not entitled to compensatory damages. The Court agrees with that determination  
13 and adopts the recommendation. Summary judgment will be granted to Defendants Harlan and  
14 Gomez regarding that claim.

15 The Court further agrees with the Magistrate Judge’s recommendation to deny summary  
16 judgment to Defendant Harlan on Plaintiff’s constitutional claim, both on the grounds that  
17 Officer Harlan is not entitled as a matter of law to prevail against Plaintiff and because there are  
18 disputed issues of material fact which preclude summary judgment.

19 Finally, despite Plaintiff’s failure to object, the Court finds clear error in the  
20 recommendation that summary judgment be granted to Defendant Gomez. There are sufficient  
21 similarities between the circumstances implicating both officers to deny summary judgment as a  
22 matter of law, and sufficient counterfactual allegations to find disputed issues of material fact  
23 which likewise preclude dismissal of the claims against Officer Gomez.  
24

The clerk is ordered to provide copies of this order to the Honorable Mary Alice Theiler, the Plaintiff, and to all counsel.

Dated December 10, 2019.

Wasschup. Belina

Marsha J. Pechman  
United States Senior District Judge